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No. OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1994

ZAIDA HERNANDEZ TORRES, ROBERTO REXACH BENITEZ, NELIDA JIMENEZ VELAZQUEZ,

Petitioners,

vs.

OLGA J. NEGRON GAZTAMBIDE,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit

PETITION FOR WRIT OF CERTIORARI

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42 pp

QUESTION PRESENTED

Whether the dismissal of a Librarian V, employed by Puerto Rico's Legislative Assembly's Legislative Library, is an act shielded by the Legislative Immunity Clause as expounded in the Constitution of the United States, Art. I, Sec. 6, and the Constitution of the Commonwealth of Puerto Rico, Art. III, Sec. 14.

PARTIES BELOW

The following persons were parties to the proceeding in the United States Court of Appeals for the First Circuit, the Court whose judgment is sought to be reviewed:

Olga Negrón Gaztambide

Zaida Hernández Torres

Roberto Rexach Benítez

Nelida Jimenez Velázquez

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No.

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OLGA J. NEGRON GAZTAMBIDE,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

PETITION FOR A WRIT OF CERTIORARI

To the Honorable Court, the Chief Justice and Associate Justices of the Supreme Court of the United States: Zaida Hernández Torres, Roberto Rexach Benítez and Nélida Jiménez Velázquez, the Petitioners herein, pray that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the First Circuit entered in the above entitled case on September 15, 1994.

OPINION BELOW

The opinion of the United States Court of Appeals is reported at 35 F. 3d 25 (1st Cir. 1994).

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the First Circuit was entered on September 15, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Art. I, Sec. 6:

> The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States. They shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective House, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.
>
> No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been increased during such time; and no Person holding any Office under the United States, shall be a Member of

> either House during his Continuance in Office.

Constitution of the Commonwealth of Puerto Rico, Art. III, Sec. 14:

> No member of the Legislative Assembly shall be arrested while the house of which he is a member is in session, or during the fifteen days before or after such session, except for treason, felony or breach of the peace. The members of the Legislative Assembly shall not be questioned in any other place for any speech, debate or vote in either house or in any committee.

STATEMENT OF THE CASE

On June 22, 1993, Respondent Olga Negrón Gaztambide filed a civil action pursuant to the provisions of 28 U.S.C. § 1331, 28 U.S.C. § 1343 and 42 U.S.C. § 1983, and the Americans With Disabilities Act of 1990, as amended, Pub. L. No. 101-336.

Olga Negrón Gaztambide was employed by Puerto Rico's Legislative Assembly's Office of Legislative Services as a Librarian V assigned to the Legislative Library. The Legislative Library's staff is comprised by a Director, five Librarians and their assistants and two secretaries who perform as a whole, in a synchronized manner in order to fully and effectively accomplish the duties assigned to it by law.

The Office of Legislative Services (the Office) was created and organized, pursuant to Resolution of January 27, 1954, by a Joint Committee of the Legislature of Puerto Rico. The Office's purpose would be to provide advise and counsel to the Legislature of the Commonwealth of Puerto Rico.

The task of "advising" the Legislative Assembly comprises functions and duties, which intermingle to provide the Legislature with the best and most complete service. Among the chores performed by the Office are: legislation drafting, compilation and processing of legislative data, library research, official translations and legal and economic studies essential to the legislative process.

In sum, the Office of Legislative Services provides the Legislators individually, and the Legislative Assembly, as a whole, with a systematic and synchronized structure, *with the Legislative Library at its core,* which delivers the necessary support required for the sound, continuous and uninterrupted performance of the legislative process.

The Legislative Library was created by Law No. 59 of June 19th, 1964, as an integral part of the Office of Legislative Services.

The Statement of Motives of said Law reads as follows:

> WHEREAS, the Puerto Rican legislator, surrounded as he is by the complexities of a fast growing community, jointly with the local problems and electoral mandates, needs and is entitled to a consultation and information service which is centralized and kept up to date;
>
> WHEREAS, during recent years the Legislative Assembly of Puerto Rico has been emphasizing the improvement of legislative services and assistance;
>
> WHEREAS, it is recognized that one of

> the best sources of ready information and help for the legislator is a library of a general character;
>
> WHEREAS, the purpose of a library of this kind should be to make all kinds of basic reference material available to the members of the Legislative Assembly and to persons in the community who may be interested in gathering data on the legislative proceedings and other governmental activities;
>
> WHEREAS, such a library would meet a public need; therefore,
>
> BE IT ENACTED BY THE LEGISLATURE OF PUERTO RICO:
>
> Section 1. – Creation of the Legislative Library. – The Legislative Library is hereby created in the Legislative Service Office.

Therefore, it was the express purpose of the Legislature to rely on the services and assistance offered by the Legislative Library for the furtherance of the ongoing legislative process.

Ms. Negrón alleged that her duties at the Legislative Library, as Librarian V, "did not constitute an integral element of the meaningful input necessary for the performance of defendant's legislative duty and for the general functioning of the legislative process".

Therefore, Ms. Negrón alleged dismissal by Petitioners, on January 1993, on the basis of political discrimination (affiliation) in violation of her First Amendment and due process rights, as

protected under the Constitution of the United States and in violation of the dispositions of the Americans With Disabilities Act. As a result of the alleged violations, Ms. Negrón prayed for injunctive relief and position reinstalation, and asserted damages ascending the sum of Three Million Dollars ($3,000,000), including punitive damages, plus costs and attorneys fees.

On August 5, 1993 Petitioners filed a Motion to Dismiss for Lack of Jurisdiction based on the Legislative Immunity Doctrine.

On October 18, 1993, the United States District Court for the District of Puerto Rico issued an order dismissing the case, after having fully read Petitioner's unopposed Motion to Dismiss for Lack of Jurisdiction. (Appendix B and C).

On November 18, 1993 Petitioners filed a Motion to Oppose Plaintiff 's Motion to Alter and/or Amend Judgment.

The United States District Court for the District of Puerto Rico denied Ms. Negrón's Motions on November 17, 1993. On November 29, 1993 Ms. Negrón filed her Notice of Appeal.

On June 6th, 1994, the Court of Appeals held Oral Argument on the case.

On September 15, 1994, the Court of Appeals entered judgment reversing the District Court's dismissal of Ms. Negrón's Sec. 1983 claim and remanded the case for further proceedings consistent with the opinion. (Appendix A).

Petitioners timely filed a "Petition for Rehearing In Banc" on September 26, 1994, pursuant to Rule 40 of the Federal Rules of Appellate Procedure and the U.S. Court of Appeals for the First Circuit's Local Rule 35.1. The Petition was denied on November 30, 1994. (Appendix D).

REASONS FOR GRANTING WRIT

THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT RENDERED A DECISION IN CONFLICT WITH THE DECISIONS OF OTHER UNITED STATES COURTS OF APPEAL ON THE SAME MATTER, AS WELL AS THE UNITED STATES SUPREME COURT'S DOCTRINE.

The Judgment rendered by the Court of Appeals, depicting the task of selecting as well as separating from his job a Legislative Assembly employee –in fact a Librarian V adscribed to the Office of Legislative Service's Legislative Library– effectively diluted the Legislative Immunity Privilege and voided the Constitutional Clause's purpose and applicability.

For purposes of clarity in Petitioner's argument, the same has been divided between the Judgment's procedural and substantive issues.

A. Procedural Grounds

The First Circuit in the opinion rendered on September 15, 1994, stated that for purposes of the appeal the court need not decide whether Defendant's (Petitioners) Motion to Dismiss was more appropriately cast under F.R.C.P. 12(b)(1) (lack of subject matter jurisdiction) or F.R.C.P. 12(b)(6) (failure to state a claim upon which relief can be granted). Nevertheless, the court, acting de novo, took the allegations of the Complaint as true and expressed that it would not affirm the District Court's dismissal unless it appeared beyond doubt that the Plaintiff (Respondent) could not prove any set of facts in support of her claim which would entitle her to relief.

The First Circuit, *however*, in *Correa Martínez v. Arrillaga*

Beléndez, 903 F. 2d 49 (1st Cir. 1990), stated that even when dismissing a case under Rule 12(b)(6), after having given deferential treatment to the facts alleged in the Complaint, the Rule does not entitle a plaintiff to rest on "subjective characterizations". *Correa* as well stated that in cases

> where civil rights violations are alleged, particular care is required to balance the liberality of the Rules with the need to prevent abusive and unfair vexation of defendants. A civil rights Complaint must "outline facts sufficient to convey specific instances of unlawful discrimination. . . ." A plaintiff may not prevail simply by asserting that defendant was motivated by a discriminatory animus. The alleged facts must specifically identify the particular instances of discriminatory treatment and adequately support the allegation that the discrimination was unlawful.

Id. at 52-53. (Citations omitted). (Emphasis ours).

In the present case, the alleged facts on Respondent's civil rights Complaint simply state that Petitioners were motivated by discriminatory reasons. The Complaint does *not identify particular instances* of discriminatory treatment or adequately supports the allegation that the discrimination was unlawful. It only asserts that since, allegedly, Ms. Negrón is affiliated to the Popular Democratic Party and the Director of the Office of Legislative Services, as well as the Speaker of the House of Representatives and the President of the Senate of Puerto Rico are affiliated with the New Progressive Party, Ms. Negrón was dismissed.

In *Correa* the First Circuit carefully balanced the liberality of the Civil Rules with defendant's rights as confronted with mere allegations of political discrimination. The court furthermore stated:

> While Rule 12(b)(6) requires deference to the wellpleaded allegations of plaintiff's complaint, we are not obligated to give free rein to imagination. See *Gooley*, 851 F. 2d at 514 ("court need not conjure up unpled allegations or contrive elaborately arcane scripts"). Although we must draw all reasonable inferences in plaintiff's favor we are not obligated to credit every conceivable inference. See *Gray*, 792 F.2d at 256 ("unreasonable and speculative inferences' cannot be allowed to bottom a civil rights action").

On the other hand, since Petitioner's Motion to Dismiss was based on the lack of jurisdiction of the court due to the constitutionally expounded Legislative Immunity Privilege, the allegations of the Complaint were deemed not controlling. Thus, the allegations were considered merely evidence on the issue, 5A. C. A. Wright and A. Miller, *Federal Practice and Procedure*, § 1350, pp. 194-239; § 1363, pp. 456-458; *Heller v. CACL Federal Credit Union*, 775 F. Supp. 839, 841 (E.D. Pa. 1991), and the court was not required to accept the allegations of the Complaint as true. *See also, Bellock v. Orkin Exterminating Co., Inc.*, 754 F. Supp. 122 (N.D. Ill. 1990); *Commonwealth Land Title Ins. Co. v. United States*, 759 F. Supp. 87 (D. Conn. 1991); *Operative Plasterers & Cement Masons v. Benjamin*, 776 F. Supp. 1360 (N.D. Ind. 1991); *Estate of Blakely v. Asbestos Corp.*, 766 F. Supp. 721 (E.D. Ark. 1991); *Michigan State Employees Ass'n v. Marlan*, 608 F. Supp. 85, 87-88 (D.C. Mich. 1984).

Moreover, Petitioners relied on the principle that defenses based upon the Legislative Immunity Privilege should be dealt with *before the merits of the case are reached.* The "principle is designed to protect legislators not only from the consequences of litigation's results but also from the burden of defending themselves'." *Vander Jagt v. O'Neill,* 699 F. 2d 1166, 1171, n. 8 and 1185, n. 5 (D.C. Cir. 1983) (Judge Bork affirming principle), citing from *Davis v. Passman,* 442 U.S. 228, 236, n. 11 (1979). *See also, Vander Jagt v. O'Neill,* 524 F. Supp. 519 (D.C. 1981).

Following this principle, if Petitioners would have refuted or rebutted the Complaint's allegations, they would have entered *into the merits of the controversy. See also, Eastland v. United States Servicemen's Fund,* 421 U.S. 491, 511, n. 17 ("... the purposes which the Clause serves require that [motions to dismiss] be given the most expeditious treatment by district courts because one branch of Government is being asked to halt the functions of a coordinate branch. If there is a dismissal and an appeal, courts of appeal have a duty to see that the litigation is swiftly resolved.").

B. Substantive Grounds

The United States Court of Appeals Judgment was based on the conclusion that the act of dismissing a Legislative Assembly employee, in the present case a Librarian V at the Legislative Library, was an administrative act and not a legislative act, not entitled to the protection of the constitutionally expounded Legislative Immunity Doctrine.

On the question of the distinction of *legislative versus administrative acts,* the United States Supreme Court has never distinguished between *legislative and administrative acts,* in the congressional context, while interpreting the Speech or Debate

Clause. However, the First Circuit in *Cutting v. Muzzey*, 724 F.2d 259 (1st Cir. 1984); *Vacca v. Barletta*, 933 F.2d 31 (1st Cir. 1991); and *Acevedo Cordero v. Cordero Santiago*, 958 F.2d 20 (1st Cir. 1992) when interpreting the extension of the Legislative Immunity Doctrine, *in the Executive Branch context*, has established two tests for its determination:

> The first test focuses on the nature of the facts used to reach the given decision. If the underlying facts on which the decision is based are "legislative facts", such as "generalizations concerning a *policy* or state of affairs", then the decision is *legislative*. If the facts used in the decision making are more specific, such as those that relate to particular individuals or situations, then the decision is administrative. The second test focuses on the particularity of the impact of the state of action. *If the action involves establishment of a general policy, it is legislative*; if the action single[s] out specifiable individuals and affect[s] them differently from others, it is administrative.

(*Cutting*, 724 F.2d at 261). (Emphasis ours).

The First Circuit adopted this two-pronged test in *Cutting* after finding "persuasive" the analysis stated in a law review article titled "*Developments in the Law-Zoning*", 91 Harv. L. Rev. 1427, 1510-11 (1978). *The article, in fact, deals with an attempt to distinguish between legislative and administrative zoning acts.* *Id.* at 1509.

Petitioners respectfully consider, as was suggested to the Court of Appeals in the Petition for Rehearing in Banc, that the

law review article is excellent in its application *to zoning regulations,* but not for establishing a criteria in personnel decisions affecting the Legislative Branch of Government.

The cases in which the First Circuit established the referred tests can be distinguished from the present case in as much as they deal with the Executive Branch – where the Legislative Immunity Doctrine has been extended to acts performed by *government officials* acting on a "legislative" capacity delegated by virtue of law approved by Congress or the appropriate legislative body. *The Privilege has been extended in those situations not by reason of its fundamental purpose as a stronghold of the separation of powers doctrine,* since these cases do not deal with coordinate, equal branches of government, but instead with dependencies or agencies of the same Branch of government: the Executive (for example, a Planning Board and Ponce's Municipal Assembly, both components of the Executive Branch).

Thus, the differences in the constitutional nature of the three Branches of government were not taken into consideration. Contrary to the Judiciary and Executive, the Legislature or Congress is by excellence, the "political" branch of our democratic government, in its purest sense: the true representation of the People, sovereign in our republican system of government. It is the smallest in size as it is limited to the Senators, Representatives, their staffs and in Puerto Rico's case, the Office of Legislative Services and the Capitol Superintendency. All of its components' duties are either closely related, or essential to the furtherance of the legislative process.

However, if this Honorable Court, as the First Circuit did, were to extrapolate the criteria utilized in the Executive Branch of Government into the Legislative Branch and apply the *Cutting v. Muzzey tests* to the present case, *then, it would find that the*

underlying facts on which the dismissal decision was based dealed directly with the internal rules of government enacted by both legislative chambers. Those internal rules specifically state that the recruitment of the Legislative Assembly's employees, is based on the principle of free selection and free dismissal as the President sees fit for the due functioning of the legislative process. ***Thus, the dismissal involves the establishment of a general legislative policy. Rule 7 of the Rules of the House of Representatives and Rule XV of the Rules for the Personnel of the Senate of Puerto Rico,*** were enacted in response to the constitutional mandate expounded in Art. III, Sec. 9 of the Constitution of the Commonwealth of Puerto Rico, which delegates on the Legislative Assembly the power to promulgate rules for its internal government and proceedings. Its counterpart in the United States Constitution is Art. I, § 5. Rule VII states as follows:

RULE VII
EMPLOYEES OF THE HOUSE

> 1. ***The permanent employees of the House shall be designated by the Speaker and shall exercise their functions during the term of each Legislature. The Speaker may, at any time, declare expired the term for which any employee was appointed, when in his/her judgement, it is necessary and convenient for the service, and shall appoint the corresponding sucessor.***
>
> 2. The temporary employees at the service of the House shall be appointed in the same manner as the permanent employees.
>
> 3. The Speaker may impose disciplinary

> sanctions on the employees and shall have the power to suspend them from office for failure to comply with his/her duties. In such case, the suspended employee shall not receive salary nor any remuneration whatsoever and the Speaker may appoint a substitute, thus informing the matter to the House in its next session.

On the other hand, and of utmost importance in analyzing the Court of Appeal's Judgment, Petitioners notice *that the opinion does not cite or refer to the leading United States Supreme Court cases interpreting the Legislative Immunity Privilege.* Petitioners respectfully consider that an opinion which produces a Judgment dismissing a claim of Legislative Immunity must take into consideration the *Gravel* test. The question on the reach or extension of the privilege was formulated by this Honorable Court in *Gravel v. United States,* 408 U.S. 606 (1972) as follows: whether the challenged act or activity is an integral part of the deliberative and communicative process by which members of Congress or State Legislatures participate in legislative proceedings with respect to the consideration and passage or rejection of proposed legislation, *or with respect to other matters which the Constitution places within the jurisdiction of either House. Gravel,* 408 U.S. at 625.

Furthermore, this Honorable Court *held* in *Davis v. Passman,* 442 U.S. 228 (1979) n. 11, that judicial review of *congressional employment decisions is constitutionally limited only by the reach of the Speech or Debate clause.* This has been the only expression of the United States Supreme Court in congressional employment decisions.

The United States Court of Appeals for the First Circuit addressed this issue in *Agromayor v. Colberg,* 738 F.2d 55 (1st

Cir. 1984), precisely analyzing extensively the *Davis v. Passman* decision.

In *Agromayor* the Court of Appeals for the First Circuit came to the conclusion that, to the extent that an employee of the Legislative Assembly's functions are essential to the legislative process, his selection is an act protected by the Legislative Privilege. *Are not a Librarian V's functions essential to the legislative process?* We consider that not retaining her services should be an act protected by the privilege, since it is an employment decision as well. Furthermore, in the present case, her duties as a reference Librarian, in fact, director of the reference section of the Legislative Library, directly involved the day to day legislative investigation process which precedes the deliberative and communicative process by which legislation is enacted.

Therefore, as stated in *Agromayor v. Colberg,* by the Court of Appeals, this type of employee must be of direct legislative importance. *Agromayor,* 738 F.2d at 60. The Librarian's position, indeed is one which provides a *meaningful* input into the legislative process such that the decision of not retaining her should be immunized.

Having such a fundamental decision as *Agromayor* at hand, the opinion of the Court of Appeals did not cite nor considered *Agromayor, which expressly contemplated Puerto Rico's Legislative Assembly's personnel scenario.*

The Court *instead* relied on criteria elaborated in Executive Branch decisions such as *Gross v. Winter,* 876 F.2d 165 (D.C. Cir. 1989), where a discharged employee of a District of Columbia council member brought action against her, and the Court of Appeals distinguishing its previous precedent on legislative immunity, *Browning v. Clerk, U.S. House of Representatives,* 789

F.2d 923 (D.C. Cir.), *cert. denied,* 479 U.S. 996 (1986), and applying the criteria exposed in *Forrester v. White*, 484 U.S. 219 (1988), found it "controlling in the present case". *Gross*, 876 F.2d at 172. The D.C. Circuit expressly stated that in delivering their decision they *did*

> *not reach the question whether special considerations applicable to members of Congress, such as separation-of-powers concerns, continue to justify the absolute immunity standard for congressional personnel decisions adopted in Browning.*

Id. (Emphasis ours).

Therefore, in *Gross,* the Court of Appeals did establish a distinction between "legislative acts" performed in the Executive Branch context, and "legislative acts" performed in the congressional context.

Moreover, Petitioners respectfully consider the *Browning* test, controlling in the present case, as its Legislative Immunity criteria for personnel decisions is fully compatible with the First Circuit's *Agromayor v. Colberg* criteria: *if the dismissed employee's duties are directly related to the due functioning of the legislative process, the personnel decision – in this case dismissal – is non justiciable, as it is shielded from judicial scrutiny by the Legislative Immunity Privilege. Browning,* 789 F.2d at 931; *Agromayor,* 738 F. 2d at 59.

The Court of Appeals for the First Circuit in reaching its decision in the present case, also relied heavily on *Forrester v. White,* 484 U.S. 219 (1988), a decision which dealt with Judicial Immunity.

The passages cited from *Forrester* are misleading, since the expressions of the United States Supreme Court in that decision referred to the principle of Judicial Immunity as applied to the dismissal of a probation officer. In fact, the First Circuit in its opinion cited a passage from *Forrester* which does not exist in the *Forrester* decision (Appendix A, p. 8a). The Court of Appeals states:

> Acts undertaken by legislators that are administrative in nature do not "give rise to absolute immunity from liability in damages under Sec. 1983" *Forrester,* 484 U.S. at 229

There is no similar passage at page 229 of the *Forrester* decision. The above stated expression is in fact an erroneous interpretation made in *Gross v. Winter,* of what the United States Supreme Court expressly stated in *Forrester. Gross,* 876 F.2d at 172.

Petitioners have stated on several occasions that *Forrester* specifically and expressly stated that while the Court had "*generally been quite sparing in its recognition of claims to absolute official immunity, [o]ne species of such legal protection is beyond challenge: the Legislative Immunity created by the Speech or Debate Clause"; but not extending the scope of the protection further than its purposes require. Forrester,* 484 U.S. at 224 (Emphasis ours).

The United States Supreme Court, in *Forrester* referred to *Davis v. Passman* and *Gravel v. United States* and its progeny, *only in one portion of the decision, in fact an isolated paragraph, which if read carefully in the context of the opinion as a whole, clearly reflects the intention of the Court of addressing the Legislative Immunity Doctrine as a distinct and separate scenario. In no other portion or segment of the Forrester decision the issue of Legislative Immunity is addressed.*

The Court of Appeals panel's decision in the present case, has the effect of *straightjacketing* every personnel decision a legislator must make in order to maintain the effectiveness of the legislative process.

In fact, the decision goes against what the Clause tries to prevent; diverting the legislators task of legislating by subjecting them to a continuous questioning by the judiciary of their acts taken in their legislative capacity in pursuance and for the furtherance of the legislative process.

By applying the dichotomy of *legislative acts versus administrative acts* as interpreted in the context of Executive Branch decisions, and not in the constitutional framework *which requires regarding the Legislative Branch of Government as an equal but separate Branch with its own judicially formulated criteria for the exercise and application of the Legislative Immunity Doctrine,* the Court of Appeals has treated Puerto Rico's Legislative Assembly as an agency adscribed to the Executive Branch. The First Circuit in effect, goes back and sets aside its own Doctrine on Legislative Immunity issues, based strongly in the *Gravel* and *Passman* Supreme Court decisions.

In reasserting the First Circuit well-fundamented doctrine, as above mentioned, Petitioners strongly state that personnel decisions are an integral part of the due functioning of the legislative process. These decisions, are constitutionally protected by the Legislative Immunity Doctrine if the employees' duties are an integral part or exert a meaningful input into the legislative process, different from employment decisions of employees whose duties are not related to the legislative process. For example a cafeteria employee. *See Walker v. Jones,* 733 F.2d 923 (D.C. Cir. 1984).

Ms. Negrón as a Legislative Assembly employee, adscribed

to the Office of Legislative Service's Legislative Library most certainly qualified under the *Agromayor* and *Gravel* tests.

CONCLUSION

Wherefore, Petitioners respectfully pray that a writ of certiorari be granted to correct the United States Court of Appeals for the First Circuit's misguided application of the Legislative Immunity Doctrine.

Respectfully submitted,

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December 7, 1994

APPENDIX A — UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT'S JUDGMENT DATED SEPTEMBER 15, 1994

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 93-2376
No. 94-1183

OLGA J. NEGRON-GAZTAMBIDE,

Plaintiff, Appellant,

v.

ZAIDA HERNANDEZ-TORRES, ETC., ET AL.,

Defendants, Appellees.

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

[Hon. Juan M. Perez-Gimenez, *U.S. District Judge*]

Before

Selya, *Circuit Judge*,

Campbell, *Senior Circuit Judge*,

and Lagueux, *District Judge*.*

Carlos A. Del Valle Cruz, with whom *Ricardo L. Torres Munoz*, was on brief for appellant.

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* Of the District of Rhode Island, sitting my designation.

Appendix A

Teresa Medina Monteserin, with whom *Manuel D. Herrero Garcia,* and *Miguel A. Pagan-Rivera* were on brief for appellees.

September 15, 1994

CAMPBELL, *Senior Circuit Judge.* Olga Negron Gaztambide ("Negron"), plaintiff-appellant, was employed by the Legislative Service Office of the Commonwealth of Puerto Rico as a librarian in the Legislative Library.[1] In late January or early February 1993, Negron was discharged from her position. She learned of this action by way of a letter, dated January 29, 1993, signed by Nelida Jimenez Velazquez ("Jimenez"), Director of the Legislative Service Office.[2] On June 22, 1993, Negron sued Jimenez in the United States District Court for the District of Puerto Rico. Also named as defendants were Zaida Hernandez Torres ("Hernandez"), President of the House of Representatives of the Commonwealth of Puerto Rico, and Roberto Rexach Benitez ("Rexach"), President of the Senate of the Commonwealth of Puerto Rico. Negron claimed that she had been dismissed (1) because of her political affiliation with Puerto

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1. The purpose of the Legislative Library is "to make all kinds of basic reference material available to the members of [Puerto Rico's] Legislative Assembly and to persons in the community who may be interested in gathering data on the legislative proceedings and other governmental activities." 1964 P.R. Laws Act No. 59 (Statement of Motives).

2. Pursuant to P.R. Laws Ann. tit. 2, § 424 (1982):

> All officers and employees of the Legislative Library shall form part of the personnel of the Legislative Service Office and shall be appointed according to the procedure established for the appointment of said personnel.

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Rico's Popular Democratic Party in violation of the First, Fifth, and Fourteenth Amendments of the United States Constitution and 42 U.S.C. § 1983 (1988), (2) without a hearing in violation of the Due Process Clause of the Fifth and Fourteenth Amendments, and (3) in disregard of her handicapped condition in violation of the Americans with Disabilities Act, 42 U.S.C. §§ 12101-12213 (Supp. IV 1992).

On August 5, 1993, Hernandez and Jimenez moved to dismiss Negron's complaint for lack of jurisdiction. They argued that their decision to discharge Negron was a legislative act protected by the Legislative Immunity Doctrine.[3] *See* U.S. Const. art. I, § 6 (Speech or Debate Clause); P.R. Const. art. III, § 14. On October 14, 1993, Negron moved for an extension of time within which to oppose defendants' motion to dismiss. Her motion was denied. On October 18, 1993, the district court issued the following order:

> Before the Court is the defendants' unopposed motion to dismiss for lack of jurisdiction. After fully reading the same, the Court finds itself in accord with the legal arguments proffered by the defendants in support of their motion.

WHEREFORE, for the reasons stated in defendants' motion, this case is hereby DISMISSED pursuant to Fed. R. Civ. P. 12(b)(6).[4] (footnote supplied).

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3. "The doctrine of absolute [legislative] immunity provides a complete bar to civil liability for damages, regardless of the culpability of the actor. . . ." *Acevedo-Cordero v. Cordero-Santiago*, 958 F.2d 20, 22 (1st Cir. 1992).

4. The district court observed that defendants' motion was unopposed. (Cont'd)

Judgment was entered on October 29, 1993. Thereafter, on November 2, 1993, Negron filed a motion to alter or amend the judgment pursuant to Fed. R. Civ. P. 59(e). This motion was supplemented by Negron on November 4, 1993, subsequently opposed by defendants, and ultimately denied by the district court on November 17, 1993. This appeal followed on November 29, 1993.[5] We do not disturb the district court's dismissal of Negron's claims under the Due Process Clause and the Americans with Disabilities Act, but we reverse the dismissal of her § 1983 claim.

I.

Although defendants ostensibly brought their motion to dismiss under Fed. R. Civ. P. 12(b)(1) ("lack of jurisdiction over the subject matter"), the district court granted it pursuant to Fed. R. Civ. P. 12(b)(6) ("failure to state a state claim upon which relief can be granted"). For purposes of this appeal, however, we need not decide whether defendants' motion is more appropriately cast under one rule or the other. In either case, we review the district

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(Cont'd)

Pursuant to Local Rule 311.5 of the United States District Court for the District of Puerto Rico, "[i]f the respondent opposes a motion, [she] shall file a response within ten (10) days after service of the motion, including brief and such supporting documents as are then available. . . ." Failure to so respond renders a party susceptible to involuntary dismissal, pursuant to Fed. R. Civ. P. 41(b), for failure to prosecute. *See* Local Rule 313.3 (D.P.R.). Here, however, the district court dismissed for failure to state a claim, not failure to prosecute, and neither the court nor appellees suggest that Negron has waived her right to appeal from the dismissal by initially failing to oppose Hernandez and Jimenez's motion.

5. Negron filed a second notice of appeal on January 24, 1994, because her Rule 59(e) motion, while denied on November 17, 1993, was not actually entered in the docket until January 12, 1994.

court's decision granting defendants' motion to dismiss de novo. *Vartanian v. Monsanto Co.*, 14 F.3d 697, 700 (1st Cir. 1994). "We take the allegations of the complaint to be true, and we will not affirm the district court's dismissal unless it appears beyond doubt that the plaintiff cannot prove any set of facts in support of [her] claim which would entitle [her] to relief." *Carney v. Resolution Trust Corp.*, 19 F.3d 950, 954 (5th Cir. 1994); *e.g.*, *Vartanian*, 14 F.3d at 700.

Negron's complaint contained the following relevant allegations. Negron began her employment with Puerto Rico's Legislative Library on July 14, 1967, as a Librarian Grade II. She worked continuously for the library until she learned of her dismissal by way of a letter, dated January 29, 1993, signed by Nelida Jimenez Velazquez, Director of the Legislative Service Office. During the period of her employment, Negron's job performance was exemplary. At the time of her discharge, she was a Librarian Grade V.

On November 4, 1992 — prior to Negron's dismissal — Zaida Hernandez Torres and Roberto Rexach Benitez, members of Puerto Rico's New Progressive Party, were elected to Puerto Rico's House of Representatives and Senate, respectively. On or about January 11, 1993, Hernandez was elected President of the House of Representatives and Rexach was chosen to be President of the Senate. On that same date, Hernandez and Rexach appointed Jimenez, also a member of the New Progressive Party, Director of the Legislative Service Office. Less than three weeks later, Negron, who is affiliated with Puerto Rico's Popular Democratic Party, was discharged. She was replaced by a New Progressive Party activist.

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II.

Negron argues on appeal that, contrary to the district court's conclusion, defendants' decision to discharge her was *not* a legislative act entitled to absolute legislative immunity from damages under § 1983. We agree.

It is established that "state legislators enjoy common-law immunity from liability for their legislative acts . . . that is similar in origin and rationale to that accorded Congressmen under the Speech or Debate Clause." *Supreme Court of Va. v. Consumers Union of the United States, Inc.*, 446 U.S. 719, 732, 100 S. Ct. 1967, 64 L. Ed. 2d 641 (1980). In *Tenney v. Brandhove*, 341 U.S. 367, 71 S. Ct. 783, 95 L. Ed. 1019 (1951), the United States Supreme Court "concluded that Congress did not intend § 1983 to abrogate the common-law immunity of state legislators." *Supreme Court of Va.*, 446 U.S. at 732. Nevertheless, the Supreme Court "has been cautious in recognizing claims that government officials should be free of the obligation to answer for their acts in court." *Forrester v. White*, 484 U.S. 219, 223-24, 108 S. Ct. 538, 98 L. Ed. 2d 555 (1988). Legislators are absolutely immune only from claims that stem from their legitimate legislative activities. *E.g., Supreme Court of Va.*, 446 U.S. at 732; *Roberson v. Mullins*, No. 93-1618, __ F.3d __, 1994 WL 322560, at *1 (4th Cir. July 8, 1994); *see Forrester*, 484 U.S. at 227 ("[I]mmunity is justified and defined by the *functions* it protects and serves, not by the person to whom it attaches." (emphasis in original)); *Acevedo-Cordero v. Cordero-Santiago*, 958 F.2d 20, 23 (1st Cir. 1992) ("Under current legal theory, immunity attaches or does not attach depending on what kind of action was performed rather than on who performed the action.") Acts undertaken by legislators that are administrative in nature do not "give rise to absolute immunity from liability in damages

under § 1983." *Forrester*, 484 U.S. at 229; *Acevedo-Cordero*, 958 F.2d at 23; *Gross v. Winter*, 876 F.2d 165, 170-73 (D.C. Cir. 1989).

The issue is thus whether defendants were acting in a legislative or administrative capacity when they discharged Negron. In *Cutting v. Muzzey*, 724 F.2d 259 (1st Cir. 1984), we spoke of

> two tests for distinguishing between legislative and administrative activity. The first test focuses on the nature of the facts used to reach the given decision. If the underlying facts on which the decision is based are "legislative facts," such as "generalizations concerning a policy or state of affairs," then the decision is legislative. If the facts used in the decisionmaking are more specific, such as those that relate to particular individuals or situations, then the decision is administrative. The second test focuses on the "particularity of the impact of the state action." If the action involves establishment of a general policy, it is legislative; if the action "single[s] out specifiable individuals are affect[s] them differently from others," it is administrative.

Id. at 261 (quoting *Developments in the Law – Zoning*, 91 Harv. L. Rev. 1427, 1510-11 (1978)); *e.g.*, *Roberson*, No. 93-1618, __ F.3d __, 1994 WL 322560, at *2 ("[A] local governmental body . . . acts in a legislative capacity when it engages in the process of 'adopt[ing] prospective, legislative-type rules.' " (quoting *Front Royal & Warren County Indus. Park Corp. v. Town of Front Royal*, 865 F.2d 77, 79 (4th Cir. (1989)). Under either of these

purported tests, defendants' decision to replace Negron — a member of the Popular Democratic Party — with a New Progressive Party activist was administrative. *E.g., Forrester,* 484 U.S. at 229 (holding that state-court judge acted in an administrative capacity when he demoted and discharged a subordinate probation officer, allegedly on account of her sex, and, therefore, was not absolutely immune from a suit for damages under § 1983); *Roberson,* No. 93-1618, __F.3d__, 1994 WL 322560, at *2 (holding that members of a county board did not act in a legislative capacity when they terminated the public works superintendent, allegedly on account of his political affiliation, and, therefore, were not absolutely immune from a suit for damages under § 1983); *Gross,* 876 F.2d at 170-73 (holding that councilmember acted in an administrative, not legislative, capacity when she discharged a legislative researcher, allegedly on account of her religion, and, therefore, was not absolutely immune from a suit for damages under § 1983); *c.f. Rateree v. Rockett,* 852 F.2d 946, 950 (7th Cir. 1988) (finding absolute legislative immunity under the circumstances, but agreeing with plaintiffs "to the extent that employment decisions generally are administrative, regardless [of] whether [they are] made by a judge or a legislature"). The district court erred, therefore, when it dismissed Negron's § 1983 claim on the grounds that defendants were shielded by absolute legislative immunity.[6]

III.

The district court's dismissal of Negron's § 1983 claim is

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6. We do not reach the issue of whether defendants may be entitled to qualified imunity, *see Forrester,* 484 U.S. at 230; *Gross,* 876 F.2d at 173 n. 12, "which provides a bar to liability for damages only where the imune actor can show that his actions were reasonable," *Acevedo-Cordero,* 958 F.2d at 22.

reversed, and we remand for further proceedings consistent with this opinion . As Negron does not argue on appeal that the district court erred in dismissing her claims brought pursuant to the Due Process Clause and the Americans with Disabilities Act (*i.e.*, Counts 2 and 3), we do not disturb the district court's dismissal of those counts.

So ordered.

Appendix A

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 93-2376
No. 94-1183

OLGA J. NEGRON-GAZTAMBIDE,

Plaintiff, Appellant,

v.

ZAIDA HERNANDEZ-TORRES, ETC., ET AL.,

Defendants, Appellees.

JUDGMENT

Entered: September 15, 1994

These causes came on to be heard on appeals from the United States District Court for the District of Puerto Rico, and were argued by counsel.

Upon consideration whereof, it is now here ordered, adjudged and decreed as follows: The district court's dismissal of Negron's § 1993 claim is reversed, and the cause is remanded to the district court for further proceedings consistent with the opinion issued this date. As Negron does not argue on appeal that the district court erred in dismissing her claims brought pursuant to the Due Process Clause and the Americans with disabilities Act (*i.e.* Counts 2 and 3), the district court's dismissal of those counts is not disturbed.

Appendix A

By the Court:
FRANCIS P. SCIGLIANO
Clerk

[cc: Mr. Del Valle Cruz and Ms. Medina Monteserin]

APPENDIX B — UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO'S JUDGMENT DATED OCTOBER 29, 1993

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

CIVIL CASE 93-19114 (PG)

OLGA J. NEGRON GAZTAMBIDE

Plaintiff

vs.

HON. ZAIDA HERNANDEZ TORRES, et al

Defendants

JUDGMENT

The Court, through the Honorable Juan M. Pérez-Giménez, has entered an Order granting defendants' motion to dismiss for lack of jurisdiction. WHEREFORE, it is hereby

ORDERED and ADJUDGED that the complaint be and is hereby DISMISSED.

IT IS SO ORDERED.

San Juan, Puerto Rico, this 29th day of October, 1993.

LYDIA PELEGRIN
Clerk of the Court

Appendix B

By: s/ Lida Isis Egelé
Lida Isis Egelé
Deputy Clerk

s/c: Ricardo L. Torres Muñoz
Manuel D. Herrero García
Miguel Pagnán
O.B.

APPENDIX C — UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO'S ORDER DATED OCTOBER 18, 1993

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO

Civ. No. 93-1914 (PG)

OLGA J. NEGRON GAZTAMBIDE,

Plaintiff

v.

HON. ZAIDA HERNANDEZ TORRES, et al.,

Defendants.

ORDER

Before the Court is the defendants' unopposed motion to dismiss for lack of jurisdiction (Dkt. #5). After fully reading the same, the Court finds itself in accord with the legal arguments proffered by the defendants in support of their motion.

WHEREFORE, for the reasons stated in defendant's motion, this case is hereby DISMISSED pursuant to Fed. R. Civ. P. 12(b)(6).

IT IS SO ORDERED.

San Juan, Puerto Rico, October 18, 1993.

s/ Juan M. Perez-Gimenez
JUAN M. PEREZ-GIMENEZ
U.S. District Judge

APPENDIX D — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT DATED NOVEMBER 30, 1994

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 93-2376
No. 94-1183

OLGA J. NEGRON-GAZTAMBIDE,

Plaintiff, Appellant,

v.

ZAIDA HERNANDEZ-TORRES, ETC., ET AL.,

Defendants, Appellees.

Before

Torruella, *Chief Judge,*
Campbell, *Senior Circuit Judge,*
Selya, Cyr, Boudin and Stahl, *Circuit Judges,*
and Lagueux,* *District Judge.*

ORDER OF COURT

Entered: November 30, 1994

The panel of judges that rendered the decision in these cases having voted to deny the petitions for rehearing and the suggestions for the holding of a rehearing en banc having been

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* Of the District of Rhode Island, sitting by designation.

carefully considered by the judges of this Court in regular active service and a majority of said judges not having voted to order that the appeals be heard or reheard by the Court en banc.

It is ordered that both petitions for rehearing and the suggestions for rehearing en banc be denied.

By the Court:
s/ FRANCIS P. SCIGLIANO
Clerk.

[cc: Mr. Del Valle Cruz and Ms. Medina Monteserin]